

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the JERVIS C. WEBB Trust.

CHRISTOPHER J. WEBB,

Petitioner-Appellant,

v

JERVIS H. WEBB, Trustee, and JOYCE W.
CLARK, Former Trustee,

Respondents-Appellees.

In the Matter of the JERVIS B. & MAUREEN C.
WEBB Trust.

CHRISTOPHER J. WEBB,

Petitioner-Appellant,

v

SUSAN M. WEBB, Trustee, BARBARA J.
WEBB, Trustee, and JOYCE W. CLARK, Former
Trustee,

Respondents-Appellees.

UNPUBLISHED
January 24, 2006

No. 263759
Oakland Probate Court
LC No. 2003-289748-TV

No. 263900
Oakland Probate Court
LC No. 2004-291906-TV

CHRISTOPHER J. WEBB,

Petitioner-Appellant,

v

BARBARA M. WEBB, Personal Representative of
the Estate of GEORGE H. WEBB, Deceased,

Respondent-Appellee.

No. 263901

Oakland Probate Court

LC No. 2004-291905-CZ

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

In these consolidated cases, petitioner alleges that the trustees of his father's and grandparents' trusts breached their fiduciary duties by retaining stock held in the family's closely owned corporation, the Jervis B. Webb Company, and by failing to diversify the assets of the trusts and invest in stocks that paid higher dividends. The parties filed cross-motions for summary disposition and the probate court granted partial summary disposition for respondents. The court granted partial summary disposition under MCR 2.116(C)(7), based on the statute of limitations. Additionally, the court granted summary disposition under MCR 2.116(C)(10), holding that there was no genuine issue of material fact that respondents did not breach their fiduciary duties by retaining the family stock and failing to diversify the trusts' assets. Petitioner appeals as of right. We affirm.¹

This case involves two different trusts and three separate actions that arise out of the two trusts. The two trusts primarily consist of stock in the Jervis B. Webb Company ("the Company"), which was founded by Jervis B. Webb in 1919. The Company has grown significantly over the years, but remains a closely owned corporation and its leadership has passed between generations of the Webb family. Almost all of the Company's stock is held by family members or their trusts.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

¹ We find no merit to respondents' argument that this Court does not have subject-matter jurisdiction over respondents Jervis H. Webb, Susan Webb, and Barbara Webb, because they were not named as respondents in the trial court. As current or former trustees of the trusts at issue, they are each interested persons, MCL 700.1105, and, therefore, are properly respondents in these appeals in their representative capacities. We decline to consider petitioner's Exhibits 2-5, and 8-9, attached to his brief on appeal because those documents were not presented in the trial court. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).

Jervis B. Webb and his wife, Maurene,² founded the Company. Their children, Jervis C. Webb, George Webb, and Joyce Clark, comprise the second generation. Petitioner is the son of Jervis C. Webb. Petitioner and his six siblings, along with six children of George and Joyce, comprise the third generation.

There has been a long history of family members working for the Company. Petitioner worked for the Company after graduating from law school and served as a vice president and general counsel for the Company until November 2002.

In 1946, Jervis B. and Maurene Webb established a trust naming their three children, Jervis C., George, and Joyce, as co-trustees. That trust (hereinafter referred to as the "1946 trust") was funded solely with the Company's stock.

In 1989, Jervis C. Webb, petitioner's father, created a trust for the benefit of his children who had jobs with the Company (hereinafter referred to as the "1989 trust"). Jervis C. Webb named his siblings, George and Joyce, as the trustees.

At issue in this case are petitioner's claims that the trustees of both trusts breached their fiduciary duties. The probate court concluded that petitioner's claims were barred by the three-year limitations period prescribed in MCL 600.5805(10) and, therefore, granted summary disposition under MCR 2.116(C)(7). The court additionally held that there was no genuine issue of material fact that the trustees did not breach their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets and, therefore, granted summary disposition under MCR 2.116(C)(10).

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. As explained in *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995),

[a] defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff.

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

² According to respondents, "Maurene" is the correct spelling of petitioner's grandmother's name, but her name is incorrectly spelled as "Maureen" on the trust agreement.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The trial court held that petitioner's claims were governed by the three-year period of limitations prescribed in MCL 600.5805(10). MCL 600.5827 addresses when a claim accrues for purposes of determining when the statute of limitations begins to run:

Except as otherwise provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Sections 5829 to 5838 do not apply to this case. Therefore, pursuant to MCL 600.5827, petitioner's claim accrued at the time the alleged wrong was committed, regardless of when damages resulted, unless the discovery rule applies. The parties disagree whether the discovery rule can be applied to extend the period of limitations to claims involving breaches of fiduciary duty. We agree with the trial court that the discovery rule does not apply to this case.

In *Boyle v General Motors Corp*, 468 Mich 226, 228-229, 231-232; 661 NW2d 557 (2003), the Supreme Court reversed this Court's determination that the discovery rule applies to fraud claims. The Supreme Court's decision was based on MCL 600.5827, as well as its prior decisions in *Thatcher v Detroit Trust Co*, 288 Mich 410; 285 NW 2 (1939), and *Ramsey v Child, Hulswit & Co*, 198 Mich 658; 165 NW 936 (1917), where the Court refused to apply the discovery rule in fraud cases.³ In *Boyle, supra* at 231-232, the Court stated:

The discovery rule has been adopted for certain cases. For example, in *Johnson v Caldwell*, [371 Mich 368; 123 NW2d 785 (1963),] the Court held that the discovery rule applies to actions for medical malpractice. This Court has not, however, overruled *Ramsey* and *Thatcher*, or held that the discovery rule applies to actions for fraud or intentional misrepresentation. Moreover, after *Ramsey* and *Thatcher* were decided the Legislature enacted MCL 600.5827, which provides:

"Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Under MCL 600.5827 a claim accrues when the wrong is done, unless §§ 5829 to 5838 apply. Plaintiff does not claim that any of those sections apply.

³ *Thatcher* also involved a claim for breach of fiduciary duty by a trustee which was barred by the statute of limitations.

The Court of Appeals erred in holding that the discovery rule applies to the accrual of actions for fraud. That holding directly contradicts *Ramsey* and *Thatcher* and ignores the plain language of MCL 600.5813 and 600.5827.

Plaintiffs' cause of action accrued when the wrong was done, and they had six years thereafter to file a complaint. Because plaintiffs failed to do so, their cause of action is barred. [Footnotes omitted.]

Although *Boyle* involved a fraud claim, the principle applies here as well: the language of MCL 600.5827 is clear and unambiguous that a claim accrues when the wrong is committed, not when it is discovered, unless it falls within §§ 5829 to 5838. Thus, because the claim here does not fall within §§ 5829 to 5838, the proper test for determining when petitioner's claim for breach of fiduciary duty accrued is not when he knew or should have known of the alleged breach, but when the alleged wrong was committed, causing the alleged harm. *Boyle, supra* at 231 n 5.⁴

On the basis of the undisputed documentary evidence presented below, it is apparent that petitioner was clearly aware of both trusts and their holdings of the Company's stock for many years before these actions were filed. Because any alleged harm arising from respondents' alleged breaches of their fiduciary duties occurred more than three years before these actions were filed, the trial court properly granted summary disposition under MCR 2.116(C)(7).

We find no merit to petitioner's argument that his claims are not subject to the statute of limitations. Our Supreme Court has clarified that statutes of limitation apply to claims for breach of fiduciary duty that are cognizable at law. See *Thatcher, supra* at 416-417. Thus, MCL 600.5805 was properly applied to petitioner's claims.

In addition, petitioner's reliance on MCL 700.7307(4) for the proposition that he had five years to file his claims is misplaced. Subsection (4) of that statute was not added until the statute was amended, effective September 1, 2004. Statutes of limitation generally are not given retroactive effect unless such an intent clearly and unequivocally appears from the context of the statute itself. *Gorte v Dep't of Transportation*, 202 Mich App 161, 167; 507 NW2d 797 (1993). No such intent appears here and, therefore, MCL 700.7307(4) may not be applied retroactively.

Petitioner next argues that the trial court erred in holding that there was no genuine issue of material fact with respect to petitioner's claims that the trustees breached their fiduciary duties by retaining the Company stock and not diversifying the trusts' assets.

⁴ To the extent that this Court has held that a claim for breach of fiduciary duty accrues when the beneficiary knew or should have known of the breach, see *Bay Mills Indian Community v Michigan*, 244 Mich App 739, 751; 626 NW2d 169 (2001), we believe those cases have been overruled by *Boyle*. However, an exception to this rule exists for claims of fraudulent concealment. See *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 45-48; 698 NW2d 900 (2005); MCL 600.5855. Petitioner has not argued that MCL 600.5855 applies in this matter.

We must refer to the trust instruments to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose of the trusts. *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983). In addition, relevant statutes and case law define a trustee's duties. *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988). Whether there has been a breach of duty and any resulting liability is dependent upon the facts of each case. *Id.*

Generally, trustees must meet the standard of care of a prudent person when dealing with trust property. *In re Green Charitable Trust*, *supra* at 312. This rule is codified at MCL 700.7302 (formerly MCL 700.813⁵):

Except as otherwise provided by the terms of the trust, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.

To be prudent means to act with care, diligence, integrity, fidelity, and sound business judgment. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). In addition, a trustee is bound by the fiduciary duties of honesty, loyalty, good faith, and restraint from self-interest. *In re Green Charitable Trust*, *supra* at 313.

The prudent investor rule may require a trustee to diversify a trust's investments. That rule is summarized in Restatement Trusts, 3d (Prudent Investor Rule) (1990), § 227(b), p 8, as follows:

In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

While there may generally be a duty to diversify investments, a settlor may always authorize a trustee not to diversify. *Baldus v Bank of California*, 12 Wash App 621, 628; 530 P2d 1350, 1355 (1975).

Liability for lack of diversification is based upon a breach of a fiduciary's duty to prudently manage the estate. *In re Estate of Janes*, 165 Misc 2d 743; 630 NYS2d 472 (1995). To determine whether such a breach of duty occurred, the Court must evaluate the fiduciary's actions along with relevant factors which

⁵ MCL 700.813, repealed by 1998 PA 386, provided as follows:

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

affected or ought to have affected the fiduciary's decisions; for instance, the performance of the market, the corpus of the estate (both in size and composition), the situation and needs of the beneficiaries, potential tax consequences, the time (investment) horizon of the estate, the terms of the governing instrument . . . and the intent of the settlor

In this extensive and non exhaustive list, the terms of the governing instrument are highly important because the terms of the instrument itself can set the stage for the weight to be applied to the other factors, and can completely reframe the fiduciary's perspective in monitoring the interplay between them. [*In the Matter of Will of Charles G Dumont*, 4 Misc 3d 1003(A); 791 NYS2d 868 (NY Sur, 2004).]

An examination of the trust provisions in these cases reveal that the settlors of both trusts relieved the trustees of any duties to diversify assets and follow the prudent man investor rule with respect to the Company's stock.

The 1946 trust specifically gave the trustees the authority to retain the Company stock even if it might be imprudent to do so:

6. The Trustees shall invest and reinvest the trust estate in such investments as they deem proper. *They shall not be required to dispose of stock in the Jervis B. Webb Company, or any company succeeding to part or all of the business of Jervis B. Webb Company, and they may retain the same or may make loans to or additional investments in any such company regardless of whether they consider it a prudent investment for trustees.* Stock dividends and stock rights are to be treated as corpus. Any action of the Trustees, including voting stock or deciding on investments or sales, shall be valid if taken by a majority. . . . [Emphasis added.]

The 1989 trust similarly allowed the trustees to retain the Company stock, and further expressed the settlor's intent that the purpose of the trust was to retain the Company's stock so that his children, who were employed by the Company, would thereby benefit.

Five of Settlor's seven children and the spouse of a sixth are employed by the Jervis B. Webb Company. Settlor believes it would enhance the interest of these six children and their spouses in the Webb Companies as that term is defined below and would strengthen the companies if the six children were to acquire a beneficial interest in them on the terms set forth below. Settlor owns stock in the companies and wants to use it to set up such a beneficial interest. Accordingly, Settlor by these presents assigns, transfers, conveys and delivers to the Trustees the property described in the schedule attached hereto and made a part hereof. The Trustees agree to hold the same on the following terms and conditions.

* * *

(b) Powers of Trustee.

(i) *The Trustees specifically are authorized to retain all shares of stock in any Webb companies without regard to any rule or requirement of diversification of investments, and even if such stock does not pay dividends or pays only a small dividend.* For purposes of this trust, the term "Webb companies" shall include Jervis B. Webb Company and any corporation now or hereafter affiliated with or growing out of Jervis B. Webb Company, and "stock of Webb companies" shall include stock received as a result of a change in capital structure, liquidation, partial liquidation, reorganization, split-up, spin-off, dissolution or merger involving Jervis B. Webb Company or any other Webb Company.

(ii) Subject to (i), above, the Trustees shall have the power to invest and reinvest the trust assets in such stocks, bonds and other securities and properties as they may deem advisable, including unsecured obligations, undivided interests, interests in investment funds, mutual funds, legal and discretionary common trust funds, leases, properties which are outside of the State of Michigan and partnerships, all without diversification as to kind or amount and without being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries; and to register and carry any property in their own names or in the names of their nominee or to hold it unregistered.

(iii) In addition to the powers granted above and elsewhere in this Agreement and to all powers granted by law to trustees generally, the Trustees shall have the powers and authority set forth in Article 8 of the Revised Probate Code, being Public Act 642 of Michigan, 1978, which Article is incorporated herein by reference, as it exists on the date of this Agreement. [Emphasis added.]

Although both trusts vested the trustees with the discretion to sell the Company's stock, they also vested the trustees with the authority to retain the stock even if it would not be prudent to do so, without regard to the rules of diversification, and even if the stock did not pay dividends. The 1989 trust also made it clear that the settlor intended that the trustees should retain the Company stock so that the family could maintain control of the Company and continue to have employment opportunities with the Company.

The trial court properly determined that both trusts relieved the trustees of any duty of diversification. Because both trusts allow the trustees to retain the stock even if it would not be prudent to do so, there is no genuine issue of material fact that the settlors of both trusts intended that the trustees would not be subject to the prudent investor rule with respect to the Company stock. Accordingly, petitioner cannot rely on that rule to argue that respondents breached their fiduciary duties as trustees by holding onto the stock.

Respondents acknowledge that a court of equity may intervene and change the terms of a trust if some unusual exigency arises that was not contemplated by the settlor. *Young v Young*, 255 Mich 173, 179-180; 237 NW 535 (1931). Here, however, petitioner has not demonstrated that such an exigency existed.

In light of the plain language of the trust instruments that clearly demonstrate that the trustees may retain the Company stock even if it would not be prudent to do so, the trial court did

not err in concluding that petitioner failed to establish a genuine issue of material fact with regard to his claims that the trustees breached their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets.

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood